JOHN MARSHALL

An Address

DELIVERED IN SANDERS THEATRE CAMBRIDGE

BEFORE

The Law School of Harvard University

AND

The Bar Association of the City of Boston

ON FEBRUARY 4 1901

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JAMES BRADLEY THAYER LL.D.

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ADDRESS

MR. PRESIDENT, LADIES AND GENTLEMEN: —

IT is one hundred years ago to-day since the Supreme Court of the United States first sat at Washington, the new capital, — that "wilderness city, set in a mud-hole," of whose beginnings we have lately been reading. The court sat with a new chief justice, John Marshall, of Virginia. It is in commemoration of him and of this event, so auspicious, the beginning of inestimable benefits to his country, that we have gathered now, moved by an impulse that brings together others of our countrymen all over the United States. Outside of Virginia, few have a better right to celebrate this event than we who are here assembled; for the President who selected and commissioned Marshall was John Adams of Massachusetts, alumnus of Harvard and member of the Suffolk bar.

At that time Marshall was something over forty-five years old. He was born on September 24, 1755. His home had always been in Virginia. The first twenty years of his life were passed wholly in that

part of Prince William County which became, two or three years after his birth, the new, wide-spreading frontier county of Fauquier,—so named, after a Virginia fashion, from the new royal governor of 1758. He was born in the eastern part of it, and after some ten years, went with his father to the western part, at Oakhill and the neighborhood, just under the Blue Ridge. They show you still at Midland, on the Southern Railroad, a little south of Manassas, a small, rude heap of bricks and rubbish, as being all that is left of the house where Marshall was born; and children on the farm reach out to you a handful of the bullets with which that sacred spot and the whole region were thickly sown before a generation had passed, after Marshall's death. His education was got partly from his father, a man of character and marked courage and capacity, who served as colonel in the War of Independence, and partly from such teachers as the neighborhood furnished. For about a year, also, he was at a school in Westmoreland County, where his father and George Washington had attended; and there James Monroe was his schoolmate. At home, when he was about eighteen years old, he took up Blackstone, a book then lately printed. But he dropped it soon, for difficulties with the mother country were thickening, and Marshall began the military drill.

From 1773, for eight years, he was mainly a soldier, at first learning and teaching the drill, and then for five or six years in active service, as an officer in the Virginia Militia and the Continental Army.

During a lull, for a few months, in the latter part of this period, he studied law and philosophy at William and Mary College; and, in 1780, was admitted to the bar. Beginning practice the next year, for the following sixteen years, before entering the field of national politics, he practised law, at first in his native county, and then, after his marriage in 1783, at Richmond — a little town in the upland, whither for safety the State archives had been transferred from Williamsburg, and which had now become the capital of the State. From the beginning he was successful. Soon his success was distinguished, and he led the Richmond bar. During this period he was eight times a member of the Assembly; for two years on the Executive Council; and a member of the Virginia Federal Convention in 1788. Once only he argued a case before the Supreme Court in Philadelphia. Although he lost it in 1796, yet his argument made him famous, and he came then to know the leaders in politics. Having declined, in 1795, the office of Attorney-General of the United States, and in 1796, that of Minister to France, both offered him by

Washington, he accepted the next year, at the hands of Adams, the position of Envoy-Extraordinary to France, in connection with Charles Cotesworth Pinckney of South Carolina and Elbridge Gerry of Massachusetts.

He returned to the United States in 1798, and new honors poured in upon him fast. Very unwillingly, at the urgent request of Washington, he allowed himself to be a candidate for Congress in that year, and was elected. In the same year, he declined the place of justice of the Supreme Court of the United States, offered him by President Adams. In the spring of 1799, without his own knowledge, he was nominated Secretary of War, and against his request to withdraw the nomination, it was confirmed. But he did not enter upon this office; for the sudden withdrawal of Timothy Pickering as Secretary of State led to Marshall's appointment as his successor. He accepted that office, and filled it for the remainder of the President's term. And finally, while he had still to serve as Secretary of State for a month or more, on the 31st of January, 1801, he was commissioned Chief Justice of the United States. During the following month, at the President's request, he joined in his own person, strangely enough as it seems to us of the present day, the functions of the head of the judiciary and head of the executive Cabinet. This

had happened, however, twelve years before, in the case of John Jay.

Such was the experience, and such the training, that of a soldier, a lawyer and a statesman, with which our great Chief Justice began his new career.

During the thirty-four years and more that were to follow, before Marshall died in office, in his eightieth year, he bore himself with that distinction of intellect, that competent learning, and that strength, dignity, sweetness, and unaffected simplicity of character that all men know, and that made him no less beloved by his friends than he was honored and admired by all his countrymen.

A strange felicity it was for our country in those early shaping days, when the character of its leaders meant so much, that the career of Washington, as its Chief Executive, should have been followed so soon by that of Marshall in its chief judicial seat. Hardly can two nobler public men be found in the history of mankind than these two Virginians. Yes, Virginians! and we like to think of that to-day as we welcome here our distinguished guest [Mr. Tucker].

> Virginia gave us these imperial men, —
> She gave us these unblemished gentlemen:
> What can we give her back but love and praise,
> As in the dear, old, unestranged days.

I have now given a short summary of Marshall's life up to the time that he became Chief Justice. It is with great regret that I pass over most of the details of his personal history. A few of them only may be mentioned.

It was on his visit to Virginia, towards the end of 1779, that he met at Yorktown the beautiful little lady, fourteen years old, who became his wife three years later, and who was to be the mother of his ten children[1] and to receive from him the tenderest devotion until the day of her death, in 1831. Some letters of her older sister, Mrs. Carrington, written to another sister, give us a glimpse of Captain Marshall in his twenty-fifth year. These ladies were the daughters of Jaquelin Ambler, treasurer of the colony, living next door to the family of Colonel Marshall. Their mother was that Rebecca Burwell for whom, under the name of "Belinda," Jefferson had languished, in his youthful correspondence of some twenty years before. The girls had the highest expectations when they heard that Captain Marshall was coming home from the war. They were to meet him first at a ball, and were contending for the prize beforehand. Mary, the youngest, carried it off. "At the first introduction," writes her sister, who was but one year older, "he became devoted to her. For my own part,"

[1] Only six of his children grew to full age.

she adds, "I felt not the smallest wish to contest the prize with her. . . . She, with a glance, divined his character, . . . while I, expecting an Adonis, lost all desire of becoming agreeable in his eyes when I beheld his awkward, unpolished manner and total negligence of person. How trivial now seem all such objections," she adds, writing in 1810. "His exemplary tenderness to our unfortunate sister is without parallel." She had early become subject to a nervous affection, that lasted all her life. "But this," it is added, "has only seemed to increase his care and tenderness, and he is, as you know, as entirely devoted as at the moment of their first being married. Always, and under every circumstance an enthusiast in love, I have very lately heard him declare that he looked with astonishment at the present race of lovers, so totally unlike what he had been himself. His never-failing cheerfulness and good humor are a perpetual source of delight to all connected with him, and . . . have been the means of prolonging the life of her he is so tenderly devoted to."

"He was her devoted lover to the very end of her life," another member of his family has said. And Judge Story, in speaking of him after his wife's death, described him as "the most extraordinary man I ever saw for the depth and tenderness of his feelings."

A little touch of his manner to his wife is seen in a letter written to her from the city of Washington, on February 23, 1825, in his seventieth year. He had had an injury to his knee, about which Mrs. Marshall was anxious. "I shall be out," he writes, "in a few days. All the ladies of the secretaries have been to see me; some more than once, and have brought me more jelly than I could eat, and many other things. I thank them and stick to my barley-broth. Still I have lots of time on my hands. How do you think I beguile it? I am almost tempted to leave you to guess until I write again. You must know I begin with the ball at York, our splendid Assembly in the Palace in Williamsburg, my visit to Richmond for a fortnight, my return to the field, and the very welcome reception you gave me on my arrival at Dover, our little tiffs and makings-up, my feelings when Major Dick[1] was courting you, my trip to the Cottage [the Ambler home in Hanover County, where the marriage took place], the thousand little incidents, deeply affecting in turn."

This was the ball of which Mrs. Carrington wrote; and of the "Assembly at the Palace" she also gave an account, remarking that "Marshall was devoted to my sister."

After his marriage, and when he had begun prac-

[1] Richard Anderson, the father of the hero of Fort Sumter.

tice at Richmond, he still retained certain simple and rustic ways, brought from the army and his life in the mountain region, that troubled some persons at Richmond, whose conception of greatness was associated with very different models of dress and behavior. "He was one morning strolling," we are told, "through the streets of Richmond, attired in a plain linen roundabout and shorts, with his hat under his arm, from which he was eating cherries, when he stopped in the porch of the Eagle Hotel, indulged in a little pleasantry with the landlord, and then passed on." A gentleman from the country was present who had a case coming on before the Court of Appeals, and was referred by the landlord to Marshall as the best lawyer to employ. But "the careless and languid air" of Marshall had prejudiced the man, and he refused to employ him. The clerk of the court, by and by, also recommended Marshall, but without success. The client observed in court an elderly lawyer in black, with a powdered wig, and retained him. In the first case this man and Marshall spoke on opposite sides. The gentleman listened, and secured Marshall at once; frankly telling him the whole story, and adding that of the hundred dollars he had brought to pay his lawyer, only five were left. Marshall good-naturedly took it, and helped in the case.

In the Virginia Federal Convention of 1788, at the age of thirty-three, he is described, rising after Monroe had spoken, as "a tall young man, slovenly dressed in loose summer apparel. . . . His manners," it is said, "like those of Monroe, were in strange contrast with those of Edmund Randolph or of Grayson."

In such stories as these, one is reminded, as he is often reminded, of a resemblance between Marshall and Lincoln. Very different men they were, but both thorough Americans, with unborrowed character and manners, and a lifelong flavor derived from no other soil.

In those efforts, on the part of some of the leaders of Virginia and the South, early in the century, to rid themselves of slavery, to which we at the North have never done sufficient justice, Marshall took an active part. The American Colonization Society was organized in 1816 or 1817, with Bushrod Washington for president. In 1823 an auxiliary society was organized at Richmond, of which Marshall was president, an office which he held nearly or quite up to the time of his death. It is interesting to observe that one of the Virginia plans for colonization was to have worked out the abolition of slavery in the year 1901.

Of slavery Marshall wrote to a friend, in 1826: "I concur with you in thinking that nothing por-

tends more calamity and mischief to the Southern States than their slave population. Yet, they seem to cherish the evil, and to view with immovable prejudice and dislike everything which may tend to diminish it. I do not wonder that they should resist any attempt, should one be made, to interfere with the rights of property, but they have a feverish jealousy of measures which may do good without the hazard of harm, that I think very unwise."

We often hear of the Chief Justice at his "Quoit Club." He was a famous player at quoits, and kept it up all his life. Chester Harding, the artist who painted the full length portrait of Marshall that hangs in the Harvard Law School, tells us of him as he saw him at the Quoit Club, in his seventy-fifth year. Fortunately, language did not, like paint, limit the artist to a single moment of time; he gives us the Chief Justice in action. The club used to meet every week in a grove, about a mile from the city. Harding went early. "I watched," he says, "for the coming of the old chief. He soon approached, with his coat on his arm and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint julep, which had been prepared, and drank off a tumblerful of the liquid, smacked his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher

of the party, and could throw heavier quoits than any other member of the club. The game began with great animation. There were several ties; and before long I saw the great Chief Justice of the United States down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout." [1]

An entertaining account has been preserved by the late Mr. George W. Munford, of a meeting of this club, apparently while Marshall was still at the bar, at which he and Wickham, a leading Virginia lawyer, one of the counsel of Aaron Burr, were the caterers. At the table Marshall announced that at the last meeting two members had introduced politics, a forbidden subject, and had been fined a basket of champagne, and that this was now produced as a warning to evil-doers. As the club seldom drank this article, they had no champagne glasses, and must drink it in tumblers. By and by, the quoit players retired for a game. Most of

[1] In speaking of this same club, another writer says: "We have seen Mr. Marshall, . . . when he was Chief Justice of the United States, on his hands and knees, with a straw and a penknife, the blade of the knife stuck through the straw, holding it between the edge of the quoit and the hub, and when it was a very doubtful question, pinching or biting off the ends of the straw, until it would fit to a hair."

the members had smooth, polished brass quoits. But Marshall's were iron, — large, rough, and heavy, such as few of the members could throw well from hub to hub. Marshall himself threw them with great success and accuracy, and often "rang the meg." On this occasion, Marshall and Parson Blair led the two parties of players. Marshall played first, and "rang the meg." Parson Blair did the same: his quoit came down plumply on top of Marshall's. At this there was uproarious applause, which drew out all the others from the dinner. Then came an animated controversy as to what should be the effect of this exploit. All returned to the table, had another bottle of champagne, and listened to arguments, one from Marshall, *pro se*, and one from Wickham, for Parson Blair. The company decided against Marshall. His argument is a humorous companion-piece to any of his elaborate judicial opinions. First he formulated the question: "Who is winner when the adversary quoits are on the meg at the same time?" Then he stated the facts, and added that the question was one of the true construction and application of the rules of the game. The first one ringing the meg, he argued, has the advantage; no other can succeed who does not begin by displacing him. The parson, he willingly allowed, deserves to rise higher and higher in everybody's esteem; but then he

must not do it by getting on his adversary's back. That is more like leap-frog than quoits. Again, the legal maxim is, *Cujus est solum ejus est usque ad coelum.* His own right, as first occupant, extended to the vault of heaven. No opponent can gain any advantage by squatting on his back, — he must either bring a writ of ejectment, or drive him out *vi et armis.* And then, after further argument of the same sort, he asked judgment; and sat down, amidst great applause.

Mr. Wickham then rose and made an argument of a similar pattern. No rule, he said, requires an impossibility. Mr. Marshall's quoit is twice as large as any other; and yet it flies from his arm like the iron ball, at the Grecian games, from the arm of Ajax. It is an iron quoit, unpolished, jagged, and of enormous weight. It is impossible for an ordinary quoit to move it. With much more of the same sort, he contended that it was a drawn game. After animated voting, protracting the uncertainty as long as possible, it was so decided. On another trial, Marshall clearly won.

Of Marshall's athletic powers when he was young, President Quincy says that he used to hear them celebrated among the men of the South whom he met in Washington early in the century. They said that he was the only man in the army who could put a stick on the heads of two persons of his own

height (six feet) and clear it at a running jump. He was famous also in the foot-race; and, running in his stocking feet, was nicknamed "Silverheels" by the soldiers, from his uniform success, and the color of the yarn with which his mother finished off his blue stockings at the heel.

Of Marshall's appearance on the bench we have a picture in one of Story's letters from Washington, while he was at the bar. He is writing in 1808, the year after the Burr trial — the year of the St. Mémin portrait. "Marshall," he says, "is of a tall, slender figure, not graceful or imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low. His manners are plain yet dignified, and an unaffected modesty diffuses itself through all his actions. His dress is very simple, yet neat. I love his laugh, — it is too hearty for an intriguer, — and his good temper and unwearied patience are equally agreeable on the bench and in the study."

And again, Story said of him in his address to the Suffolk bar, after his death: "Upon a first introduction he would be thought to be cold and reserved; but he was neither the one nor the other. It was simply a habit of easy taciturnity, watching, as it were, his own turn to follow the line of conversation, and not to presume to lead it. . . . He had great simplicity of character, manners, dress,

and deportment, and yet with a natural dignity that suppressed impertinence and silenced rudeness. His simplicity had an exquisite *naïveté* which charmed every one, and gave a sweetness to his familiar conversation approaching to fascination."

In the autumn of 1831, Marshall went to Philadelphia to undergo the torture of the operation of lithotomy, before the days of ether. It was the last operation of the distinguished surgeon, Dr. Physick. Another eminent surgeon who assisted him, Dr. Randall, has given an account of this occasion. After speaking of the danger of the operation on so old a man, he adds that "his recovery was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case."

In making preparations, Dr. Randall visited the patient about nine o'clock in the morning. "Upon entering his room, I found him engaged in eating his breakfast. He received me with a pleasant smile . . . and said, 'Well, doctor, you find me taking breakfast, and I assure you I have had a good one. I thought it very probable that this might be my last chance, and therefore I was determined to enjoy it and eat heartily.' I expressed the great pleasure which I felt at seeing him so cheerful, and said that I hoped all would soon be happily over. He replied to this that he did not feel the least anxi-

ety or uneasiness respecting the operation or its results; . . . that he had not the slightest desire to live, laboring under the sufferings to which he was then subjected; that he was perfectly ready to take all the chances of an operation, and he knew there were many against him; and that if he could be relieved by it he was willing to live out his appointed time, but if not, would rather die than hold existence accompanied with the pain and misery which he then endured.

"After he finished his breakfast I administered to him some medicine; he then inquired at what hour the operation would be performed. I mentioned the hour of eleven. He said, 'Very well; do you wish me now for any other purpose, or may I lie down and go to sleep?' I was a good deal surprised at this question, but told him that if he could sleep it would be very desirable. He immediately placed himself upon the bed and fell into a profound sleep, and continued so until I was obliged to rouse him in order to undergo the operation. He exhibited the same fortitude, scarcely uttering a murmur, throughout the whole procedure, which, from the peculiar nature of his complaint, were necessarily tedious."

From the patient over a thousand calculi were taken; he had a perfect recovery; nor did the disorder ever return.

It was at this period, in 1831 and 1832, that Inman's fine portrait of him, now hanging in the rooms of the Law Association of Philadelphia, was taken for the bar of that city. A replica is on the walls of the State library in Richmond, which Marshall himself bought for his only daughter. This portrait is regarded as the best that was ever taken of him in his later life. Certainly it best answers the description of him by an English traveller, who saw him in the spring of 1835, and said that "the venerable dignity of his appearance would not suffer in comparison with that of the most respected and distinguished-looking peer in the British House of Lords."

After his recovery in 1831, Marshall seems to have been in good health down to the early part of 1835. Then, we are told, he suffered "severe contusions"[1] in the stage-coach in returning from Washington. His health now rapidly declined, and he went again to Philadelphia for relief, where he died on July 6, 1835, of a serious disorder of the liver.

[1] Many a "severe contusion" must he have suffered in those primitive days, from upsets and joltings, in driving every year between Richmond and Washington, some one hundred and twenty miles each way; from Richmond to Raleigh and back, in attending his North Carolina circuit, about one hundred and seventy-five miles each way; and between Richmond and Oakhill, his country place, every summer, about one hundred miles each way.

He missed from his deathbed his eldest son, whom he had expected and asked for; and he never learned the pathetic tragedy which you may read now on the gravestone of that son behind the old house at Oakhill. Thomas Marshall, in hastening to his father near the end of June, was passing through the streets of Baltimore, when he was suddenly killed in a storm by the blowing down of a chimney.

The great Chief Justice was carried home with every demonstration of respect and reverence, and was buried by the side of his wife in the Shockoe Hill Cemetery in Richmond. There to-day, upon horizontal tablets, are two inscriptions of affecting simplicity, both written by himself. The first runs thus: "John Marshall, son of Thomas and Mary Marshall, was born the 24th of September, 1755. Intermarried with Mary Willis Ambler, the 3d of January, 1783. Departed this life the [6th] day of July, 1835." The second thus: "Sacred to the memory of Mrs. Mary Willis Marshall, Consort of John Marshall. Born the 13th of March, 1766. Departed this life the 25th of December, 1831. This stone is devoted to her memory by him who best knew her worth, And most deplores her loss."

Marshall's accession to the bench was marked by an impressive circumstance. For ten years or

more he alone gave all the opinions of the court to which any name was attached, except where the case came up from his own circuit, or where for any reason he did not sit. In the very few cases where opinions were given by the other justices, they were given in the old way, *seriatim*, as they were usually given before Marshall came in, and as they were given in contemporary English courts.

Whatever may have been the purpose of the Chief Justice in introducing this usage, there can be no doubt as to the impression it was calculated to produce. It seemed, all of a sudden, to give to the judicial department a unity like that of the executive, to concentrate the whole force of that department in its chief, and to reduce the side justices to a sort of cabinet advisers. In the very few early cases where there was expressed dissent, it lost much of its impressiveness when announced, as it sometimes was, by the mouth that gave the opinions of the court.

In 1812, when a change took place, the court had been for a year without a quorum. Moreover, Judge Story had just come to the bench, a man of quite too exuberant an intellect and temperament to work well as a silent side judge. We remark, also, at the beginning of that term, that the Chief Justice was not in attendance, having, as the reporter tells us, "received an injury by the over-

setting of the stage-coach on his journey from Richmond." And it may be added that just at this time the anxious prayer of Jefferson was answered, and a majority of the judges were Republicans. From whatever cause, henceforward there was a change; and, without returning to the old habit of *seriatim* opinions, the side judges had their turn, as they do now.

In coming to consider Marshall's judicial work, as before, in dealing with the personal side of him, I pass over much of what presses to be said; for I must not, on this occasion, transgress materially that little compass of an hour, which prudence, and usage, and the convenience of my hearers, on this busy day, prescribe. A few things only can be said, and these such as are not too technical and detailed to be quite unfit for your hearing to-day.

In most of Marshall's opinions, one observes the style and the special touch of a thoughtful and original mind; in some of them the powers of a great mind in full activity. His opinions relating to international law, as I am assured by those competent to judge, rank with the best there are in the books. As regards most of the more familiar titles of the law, it would be too much to claim for him the very first rank. In that region he is, in many respects, equalled or surpassed by men of greater learning, more deeply saturated with the

technicalities of the law, with that "artificial perfection of reason" of which Coke used to talk, as surpassing so much the reason of any one man, — men such as Story, Kent, or Shaw, or the reformer Mansfield whom Marshall greatly admired, Eldon, Westbury, or Blackburn. But in the field of constitutional law, and especially in one department of it, that relating to the national Constitution, he was pre-eminent, — first, with no one second. It is hardly possible, as regards this part of the law, to say too much of the service he rendered to his country. Sitting in the highest judicial place for more than a generation; familiar from the beginning, with the Federal Constitution, with the purposes of its framers, and with all the objections of its critics; accustomed to meet these objections from the time he had served in the Virginia Convention of 1788; convinced of the purpose and capacity of this instrument to create a strong nation, one competent to make itself respected at home and abroad, and able to speak with the voice and to strike with the strength of all; assured that this was the paramount necessity of the country, and that the great source of danger was in the jealousies and adverse interests of the States, — Marshall acted on his convictions. He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient

national Government; and fully also, to enforce the national restraints and prohibitions upon the States. In both cases he included not only the powers expressed in the Constitution, but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the Federal Government was established. In that long judicial life with which Providence blessed him, and blessed his country, he was able to lay down, in a succession of cases, the fundamental considerations which fix and govern the relative functions of the nation and the States, so plainly, with such fulness, such simplicity and strength of argument, such a candid allowance for all that was to be said upon the other side, in a tone so removed from controversial bitterness, so natural and fit for a great man addressing the "serene reason" of mankind, — as to commend these things to the minds of his countrymen, and firmly to fix them in the jurisprudence of the nation; so that "when the rain descended and the floods came, and the winds blew and beat upon that house, it fell not, because it was founded upon a rock."

It was Marshall's strong constitutional doctrine, explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force, placed permanently in our judicial records, holding its own during the long emergence of a

feebler political theory, and showing itself in all its majesty when war and civil dissension came, — it was largely this that saved the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces. I do not forget our own Webster, or others, in saying that to Marshall (if we may use his own phrase about Washington), "more than to any other individual, and as much as to one individual was possible," do we owe that prevalence of sound constitutional opinion and doctrine that held the Union together; to that combination in him, of a great statesman's sagacity, a great lawyer's lucid exposition and persuasive reasoning, a great man's candor and breadth of view, and that judicial authority on the bench, allowed naturally and as of right to a large, sweet nature, which all men loved and trusted, and capable of harmonizing differences and securing the largest possible amount of co-operation among discordant associates. In a very great degree, it was Marshall, and these things in him, that have wrought out for us a strong and great nation, one that men can love and die for; that "mother of a mighty race," which stirred the soul of Bryant half a century ago, as he dreamed how,

> "The thronging years in glory rise,
> And as they fleet,
> Drop strength and riches at thy feet;"

the nation whose image flamed in the heart of Lowell, a generation since, as he greeted her coming up out of the Valley of the Shadow of Death:

> "Oh Beautiful, my country, ours once more! . . .
> Among the nations bright beyond compare! . . .
> What were our lives without thee?
> What all our lives to save thee?
> We reck not what we gave thee,
> We will not dare to doubt thee,
> But ask whatever else, and we will dare!"

It fell, for the first time, to the Federal judiciary, early in Marshall's day, to take the grave step of disregarding an Act of Congress, — a co-ordinate department, — which conflicted with the national Constitution. Had the question related to a conflict between that Constitution and the enactment of a State, it would have been a simpler matter. These two questions, under European written constitutions are regarded as different ones. It is almost necessary to the working of a federal system that the general government, and any of its departments, should be free to disregard acts of any department of the local states which may be inconsistent with the federal constitution. And so in Switzerland and Germany the federal courts thus treat local enactments. But there is not, under any written constitution in Europe, a country where the court deals in this way with the act of its co-ordi-

nate legislature. In Germany, at one time, this was done, under the influence of a study of our law, but it was soon abandoned.

I must omit, very reluctantly, the historical considerations relating to this great question; the theory and the usage under our colonial charters, which prepared our people for the peculiar doctrine which we hold; the debates and the differences of opinion about it in our early conventions and elsewhere; the various contrivances for meeting this danger of unconstitutional legislation which were discussed; the early practices of our Federal Executive as to asking opinions of the judges, and, on their part, of communicating such opinions, informally and privately, to the Executive, so that he might see to it that the fundamental law was faithfully executed; these and other such matters I must, at present, pass by.

It was in 1803, when Marshall had been two years Chief Justice, that the great case above referred to, that of Marbury *v.* Madison, came up for final decision. It has been said in high quarters that there were earlier decisions of the Supreme Court holding an Act of Congress unconstitutional; but nothing yet in print justifies the statement. This was the first case. And it was more than half a century before such a decision was again rendered by this court.

Marbury *v.* Madison was a remarkable case. It was intimately connected with certain executive action for which Marshall, as Secretary of State, was partly responsible. For various reasons, the case must have excited a peculiar interest in his mind. Within less than three weeks before the end of Adams' administration, on February 13, 1801, while Marshall was both Chief Justice and Secretary of State, an Act of Congress had abolished the old system of circuit and district courts, and established a new one. This gave to the President the appointment of many new judges, and kept him and his secretary busy, during the last hours of the administration, in choosing and commissioning the new officials. And another thing. The Supreme Court had consisted heretofore of six judges. This same Act provided that after the next vacancy on the bench, there should be five judges only. Such arrangements as these, made by a party just going out of power, were not ill calculated to create, in the mind of a party coming in, the impression of an intention to keep control of the judiciary as long as possible. There were, to be sure, other reasons for some of this action. Several judges had signified to Washington, in 1790, the opinion that the Judiciary Act of 1789 was unconstitutional in making them judges of the Circuit Court. The new statute corrected

that. Yet, in regard to the time chosen for this action, it was observable that ten years and more had been suffered to elapse before the mischief then pointed out by the judges was corrected.

Another matter relating to the Supreme Court had been dealt with. This Act of February 13, 1801, provided that the two terms of the court, instead of being held, as hitherto, in February and August, should thereafter be held in June and December. Accordingly, the court sat in December, 1801. It adjourned, as it imagined, to June, 1802. But on March 8 of that year, Congress, under the new administration, repealed the law of 1801, unseated all the new judges, and reinstated the old system, with its August and February terms. And then, a little later in the year, the August term of the court was abolished; leaving only one term a year, to begin on the first Monday in February. Thus, since the June term was abolished, and February had then passed, and there was no longer a December or an August term, the court found itself, in effect, adjourned, by Congress from December 1801 to February 1803; and it had no session at all during the whole of the year 1802.

If the legislation of 1801 was calculated to show the importance attached by an outgoing political party to control over the judiciary, that of 1802 was well adapted to show how entirely the incoming

party agreed with them, and how well inclined they were to profit by their own opportunities.

How was it, meantime, with the judiciary itself? Unfortunately, the Supreme Court had already been drawn into the quarrel. For at the single December term, in 1801, held under the statute of that year, an application had been made to the court by four persons in the District of Columbia, for a rule upon James Madison, Secretary of State, to show cause why a writ of mandamus should not issue requiring him to deliver to these persons certain commissions as Justice of the Peace, which had been left in Marshall's office, undelivered, at the time when he ceased to add to his present functions those of Secretary of State. They had been made out, sealed, and signed, and were supposed to have been found by Madison when he came into office, and to be now withheld by him. This motion was pending when the court adjourned, in December, 1801. Of course, such a motion as that, — for a mandamus to the head of the Cabinet, — must have attracted no little attention on the part of the new administration and its supporters. Abolishing the August term postponed any early action by the court; and was calculated to remind the judiciary very forcibly of the power of the Legislature. At last the court came together, in February 1803, and found the mandamus case awaiting its action. It is the first

one reported at that term. Since Marshall had taken his seat, there had been only five reported cases before this one. The opinions had all been given by Marshall himself unless a few lines "by the court" may be an exception; and according to the new custom by which the Chief Justice became, wherever it was possible, the sole organ of the court, Marshall now gave the opinion in Marbury *v.* Madison. It may reasonably be wondered that he should have been willing to give the opinion in such a case; and especially that he should have handled the case as he did. But he was sometimes curiously regardless of conventions.

What was decided in Marbury *v.* Madison, and all that was decided, was that the court had no jurisdiction; and that a statute purporting to confer on it power to issue a writ of mandamus in the exercise of original jurisdiction was unconstitutional. It is the decision upon this point that makes the case famous; and undoubtedly it was reached in the legitimate exercise of the court's power.

But, unfortunately, instead of proceeding in the usual way, the opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat. It was thus elaborately laid down, in about twenty pages, out of the

total twenty-seven which comprise the opinion, that Madison had no right to detain the commissions which Marshall had left in his office; and that mandamus would be the proper remedy, in any court which had jurisdiction to grant it.

Thus, as the court, by its decision, was reminding the Legislature of its limitations, so, also, and by this irregular method, it intimated to the Executive department its amenability to judicial control; and two birds were neatly reached with the same stone. Marshall made a very noticeable remark in this opinion, seeming to point to the Chief Executive himself, and not merely to his Secretary, when he said, "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, by which the propriety or impropriety of issuing the mandamus is to be determined," — a hint that on an appropriate occasion the judiciary might issue its orders personally to him. This remark gets illustration by what happened a few years later, in 1807, when the Chief Justice, at the trial of Aaron Burr in Richmond, ordered a subpœna to the same President, Thomas Jefferson, directing him to bring thither certain documents. It was a strange conception of the relations of the different departments of the Government to each other, to imagine that an order, with a penalty, was a legitimate judicial mode of addressing the

Chief Executive. On Jefferson's part this order was received with the utmost discontent. He had a serious apprehension of a purpose to arrest him by force, and was prepared to protect himself. Meantime, he sent to the United States Attorney at Richmond the papers called for; but explained, with dignity, that while the Executive was willing to testify in Washington, it could not allow itself to be "withdrawn from its station by any co-ordinate authority."

It was partly to the same tendency on Marshall's part, already mentioned, to give little thought to ordinary conventions, and partly to his kindness of heart, that we should attribute another singular occurrence, the fact that he attended a dinner at the house of an old friend, Wickham, one of Burr's counsel, when he knew that Burr was to be present; and when that individual, having previously been brought to Richmond under arrest, examined before Marshall and admitted to bail, was still awaiting the action of the grand jury with reference to further judicial proceedings before Marshall himself. Marshall had accepted the invitation before he knew that Burr was to be of the company. I have been informed by one of his descendants that his wife advised him not to go; but he thought it best not to seem too fastidious, or to appear to censure his friend, by staying away. It is said that he sat at the opposite

end of the table, had no communication with Burr, and went away early. But we must still wonder at his action; and he himself, it is said, afterwards much regretted it.

Marshall's leading constitutional opinions may be divided into three classes: *First*, such as discuss the general character and reach of the Federal Constitution, and the relation of the Federal Government to the States. Of this class, McCulloch *v.* Maryland, probably his greatest opinion, is the chief illustration. *Second*, those cases which are concerned with the specific restraints and limitations upon the States, imposed by the Federal Constitution. To this class may be assigned Fletcher *v.* Peck, the bankruptcy cases of Sturgis *v.* Crowninshield and Ogden *v.* Saunders, and Dartmouth College *v.* Woodward. *Third*, such as deal with the general theory and principles of constitutional law. There is little of this sort. Except as it is incidentally touched, — perhaps the only case is Marbury *v.* Madison.

I cannot now speak of these cases in detail; only on one or two of them is there time to comment at all. If we regard at once the greatness of the questions at issue in the particular case, the influence of the opinion, and the large method and clear and skilful manner in which it is worked out,

there is nothing so fine as the opinion in McCulloch *v.* Maryland. The questions were, first, whether the United States could constitutionally incorporate a bank; and second, if it could, whether a State might tax the operations of the bank; as, in this instance, by requiring it to use stamped paper for its notes. The bank was sustained and the tax condemned. In working this out, it was laid down that while the United States is merely a government of enumerated powers, and these do not in terms include the granting of an incorporation; yet it is a government whose powers, though limited in number, are, in general, supreme, and also adequate to the great national purposes for which they are given; that these great purposes carry with them the power of adopting such means, not prohibited by the Constitution, as are fairly conducive to the end; and that incorporating a bank is not forbidden, and is useful for several ends. Further, the paramount relation of the national Government, whose valid laws the Constitution makes the supreme law of the land, forbids the States to tax or to "retard, impede, burden or in any manner control" the operations of the Government in any of its instrumentalities.

The opinion was that of a unanimous court, in which five out of the seven judges had been nominated by a Republican President.

As regards the third class of cases mentioned just now, that which deals with the fundamental conceptions and theory of our American doctrine of constitutional law, Marbury *v.* Madison, as I said, is the chief case. I have purposely delayed until this point any reference to this aspect of the case. While this, historically, is what gives the case its chief importance, yet it occupies only about a quarter of the opinion. In outline, the argument is as follows: The question is whether a court can give effect to an unconstitutional act of the Legislature. This is answered, as having little difficulty, by referring to a few "principles long and well established." 1. The people, in establishing a written Constitution and limiting the powers of the Legislature, intend to control it; else the Legislature could change the Constitution by an ordinary act. 2. If a superior law is not thus changeable, then an unconstitutional act is not law. This theory, it is added, is essentially attached to a written constitution. 3. If the act is void, it cannot bind the court. The court has to say what the law is, and in saying this must judge between the Constitution and the act. Otherwise, a void act would be obligatory; and this would be saying that constitutional limits upon legislation may be transgressed by the Legislature at pleasure, and thus these limits would be reduced to nothing. 4. The language

of the instrument gives judicial power in "cases arising under the Constitution." Judges are thus in terms referred to the Constitution; they are required by the Constitution to be sworn to support it, and cannot violate it. And so, it is said in conclusion, the peculiar phraseology of the instrument confirms what is supposed to be essential to all written constitutions, that a law repugnant to it is void, and that the courts, as well as other departments, are bound by it.

This reasoning is mainly that of Hamilton, in his short essay of a few years before, in the "Federalist." It answered the purpose of the case in hand; but this short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of McCulloch *v.* Maryland, Cohens *v.* Virginia, and other great cases; and it is much to be regretted. Absolutely settled as the general doctrine is to-day, and sound as it is when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations, not touched by Marshall, which affect to-day the proper administration of this extremely important power, and must have commanded his attention, if the subject had been deeply considered and fully expounded. His reasoning does not answer the difficulties that troubled Swift, afterwards Chief Justice of Connecticut, and Gibson,

afterwards Chief Justice of Pennsylvania, and many another strong man; not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written constitution, what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of a Federal court in disregarding the acts of a co-ordinate department, and in dealing thus with the legislation of the local states; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other.

Had Marshall dealt with this subject after the fashion of his greatest opinions, he must also have passed upon certain serious suggestions arising out of the arrangements of our own constitutions and the exigencies of the other departments. All the departments, and not merely the courts, are sworn to support the Constitution. All are bound to decide for themselves, in the first instance, what this instrument requires of them. None can have help from the courts unless, in course of time, some litigated case should arise; and of some questions it is true that they never can arise in the way of litigation. What was Andrew Johnson to do when the Reconstruction Acts in 1867 had been passed over his veto by the constitutional majority, while

his veto had gone on the express ground that they were unconstitutional? He had sworn to support the Constitution. Should he put in force a law which was contrary to the Constitution, or should he say, as he did say to the court, through his attorney-general, "I recognize no duty now except faithfully to carry out and execute the law"? And why is he to say this?

Again, what is the House of Representatives to do when a treaty duly made and ratified by the constitutional authority, namely, the President and Senate, comes before it for an appropriation of money to carry it out? Has the House, under these circumstances, anything to do with the question of constitutionality? If it thinks the treaty unconstitutional, can it vote to carry it out? If it can, how is this justified?

Is the situation necessarily different when a court is asked to enforce a legislative act? The courts are not strangers to the case of political questions, where they refuse to interfere with the action of the other departments, as in the case relating to Andrew Johnson just referred to; and to the need of dealing with what are construed to be merely directory provisions of the Constitution; and to the cases, well approved in the Supreme Court of the United States, where they refuse to consider whether provisions of the Constitution have been complied with,

requiring certain formalities in passing laws, — and where they accept as final the certificate of the officers of the political departments. A question, passed upon by those departments, is thus refused any discussion in the judicial forum, on the ground, to quote the language of the Supreme Court, that "the respect due to co-equal and independent departments requires the judicial department to act upon this assurance."

So far as any *necessary* conclusion is concerned, it might fairly have been said with us, as it is said in Europe, that the real question in all these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal.

I have drawn your attention to the immense services that Chief Justice Marshall rendered to his country in the field of constitutional law, and have considered a few of the cases.

Since his time not twice the length of his term of thirty-four years has gone by, but five times the number of volumes that sufficed for the opinions of the Supreme Court during his period will not hold those of his successors on that bench. Nor does even that proportion approximate the increase in the quantity of the court's business which is referable to this particular part of the law. This has

enormously increased. When one reflects upon the multitude, variety, and complexity of questions relating to the regulation of inter-State commerce; upon the portentous and ever increasing flood of litigation to which the fourteenth amendment has given rise; upon the new problems in business, government, and police which have come in with steam and electricity, and their ten thousand applications; upon the growth of corporations and of wealth; the changes of opinion on social questions, such as the relations of capital and labor; and upon the recent expansions of our control over great and distant islands, we seem to be living in a different world from Marshall's. Under these strange, new circumstances what is happening in the region of constitutional law? Very serious things indeed.

The people of the States in making new constitutions have long been adding more and more prohibitions and restraints upon their legislatures. The courts, meantime, often enter into the harvest thus provided for them with a light heart, and promptly and easily proceed to set aside acts of the legislatures. The legislatures grow accustomed to this distrust, and more and more readily incline to justify it, and to shed all consideration of constitutional restraints, — as concerning the exact extent of these restraints, — turning that subject over to

the courts; and, what is worse, they fall into a habit of assuming that whatever they can constitutionally do, they may do, — as if honor and fair dealing and common honesty were not relevant to their inquiries.

The people all this while grow careless as to whom they send to the legislature; they cheerfully vote for men whom they would not trust with an important private affair, and if these unfit persons pass foolish and bad laws, and the courts step in and freely disregard them, the people are glad that these few, wiser gentlemen on the bench, are there to protect them against their more immediate representatives.

From these causes there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, would this great, novel, tremendous power of the courts be exerted, — would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life, "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary

to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the Legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city, he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required."

That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay more, to-day it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great, and indeed inestimable, as are the advantages in a popular government of this conservative influence, — the power of the judiciary to disregard unconstitutional legislation, — it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the

people lose the political experience and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn *v.* Illinois, and the Granger cases, twenty-five years ago, and in the Legal Tender cases, nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, the infiltration through every part of the population of sound ideas and sentiments, the rousing into activity of opposing elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience which came out of it all, — far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

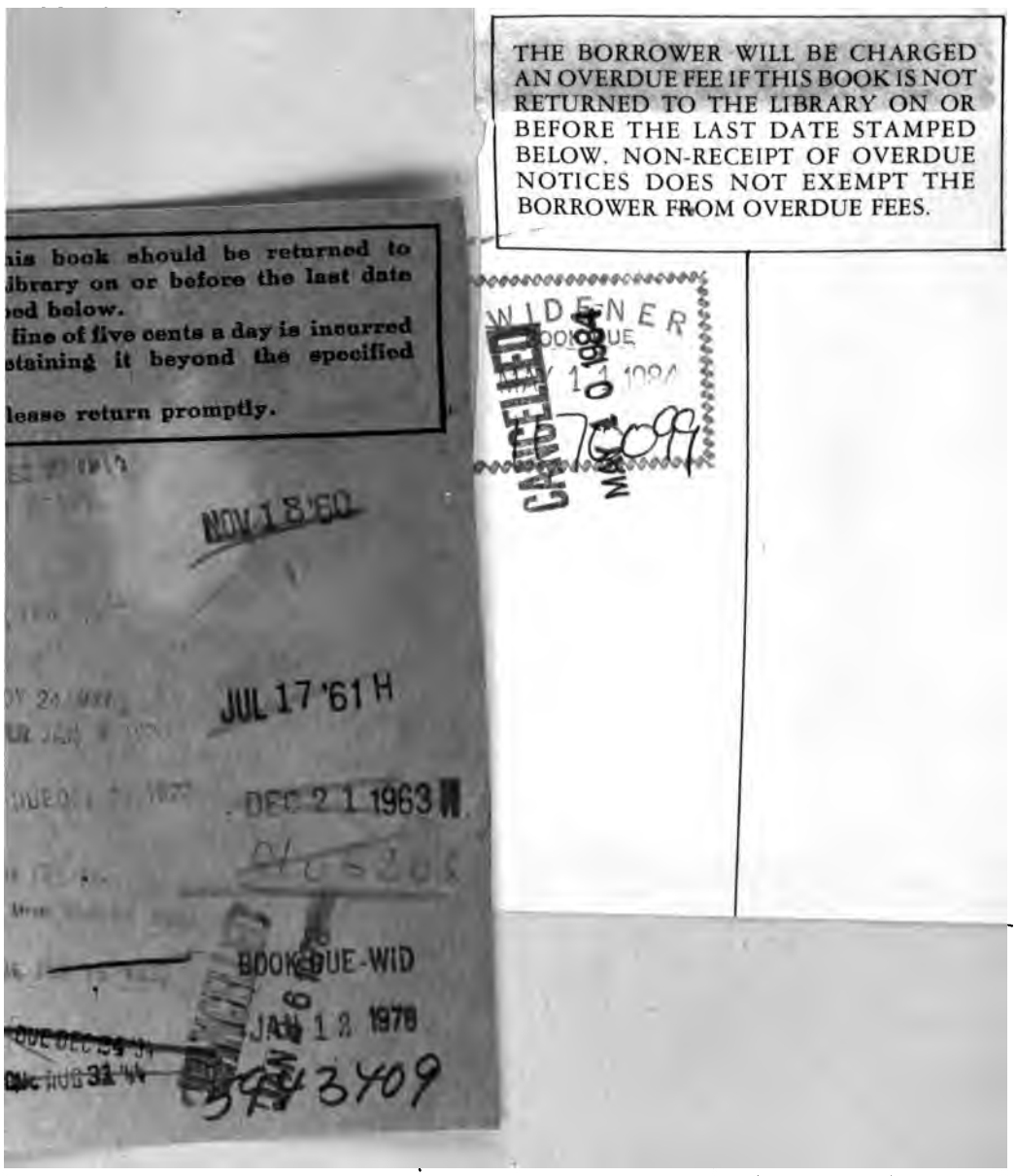
What should be done? It is the courts that can do most to cure the evil; and their opportunity is a very great one. Let them adhere to first principles, and consider how narrow is the function which the constitutions have conferred on them, — the office merely of deciding litigated cases. How large, therefore, is the duty entrusted to others, and above all to the Legislature. It is this body which is charged, primarily with the duty of judging of the constitutionality of its work. The constitutions, generally, give them no authority to call upon a court for advice; they decide for themselves, and the courts, owing to their limited function, may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators but of the legislature, the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, — a co-ordinate department of the Government, charged with the greatest functions, and invested, in contemplation of law, with all the wisdom, virtue, and knowledge that the exercise of such functions requires.

To set aside the acts of such a body, representing in its own field the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, the constitutional duty of the court remains wholly untouched; it cannot rightly undertake to protect the people by attempting a function not its own. On the other hand by adhering to its own place a court may help, as nothing else can, to fix the spot where responsibility rests, viz., on the careless and reckless legislators, and to bring down on that precise locality the thunder-bolt of popular condemnation. The judiciary, to-day, in dealing with the acts of co-ordinate legislatures, owes to the country no greater or clearer duty than that of keeping its hands off these acts wherever it is possible to do it. That course, — the true course of judicial duty always, — will powerfully help to bring the people and their representatives to a sense of their own responsibility.

There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud, — a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exert it.

And now I must stop, I have tried, however imperfectly, to give some picture of the singularly attractive personality of the great man whom we commemorate, some intimation of his remarkable qualities and achievements as a judge, some comment, and even some criticism here and there, some reflections upon the present aspects of that great subject in which he was most distinguished, and some forecast of what is to be desired and hoped for in that field.

Poor indeed must my efforts have been if they do not leave on your minds a feeling of affectionate reverence for Chief Justice Marshall, of admiration for his surpassing powers and his patriotic devotion of them to the service of his country, of gratitude to the Almighty Father of nations and of men that such a life, such a character, and such gifts were vouchsafed to our country in its early days, and of devout trust that as God has been to our fathers, so he will be to us, and to our children, and our children's children.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